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No. 79-1601

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

vs.

ROBERT MATA,
Respondent.

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is defendant's claim barred from federal habeas corpus review, and if not, are the state appellate court's factual findings entitled to the statutory presumption of correctness?

A. When a state prisoner failed to object to in-court identification testimony as required by state law, does consideration of the issue on the merits by a state appellate court foreclose the state from asserting the doctrine of procedural default in a federal habeas proceeding?

B. Assuming that the state appellate court's action precludes the state from asserting the doctrine of procedural default in the federal habeas proceeding, does the presumption of correctness of Title 28, United States Code, section 2254(d) apply to the state appellate court's factual findings?

2. Did the Court of Appeals apply erroneous standards in evaluating defendant's claim of denial of due process in the use of pretrial identification procedures?

A. Does the availability of a suspect for a physical lineup render the use of photographic identification procedures constitutionally suspect?

B. Did the Court of Appeals use the correct standard to determine whether there was a substantial likelihood of irreparable mistaken identification?

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Mata v. Sumner*, 611 F.2d 754 (9th Cir. 1979). Petition for rehearing was denied December 31, 1980, and is unreported.

JURISDICTION

The jurisdiction of this Court arises under Title 28, United States Code, section 1254(1). The petition for a writ of certiorari was granted on July 2, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, section 2254(d) provides in pertinent part:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a

> person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,
>
> • • •
>
> "And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

United States Constitution, Amendment XIV, section 1 provides in part:

> ". . . No State shall deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Proceedings in State Court

A jury convicted Robert Mata of first degree murder. He did not litigate the admissibility of identification testimony at trial.

The California Court of Appeal considered on the merits an argument relating to the admissibility of the identification testimony, notwithstanding the failure to object to the introduction of this evidence in the trial court. The court concluded that the circumstances of the case "indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." (Petition for Certiorari, C-5.) Specifically, the Court of Appeal found that the photographs displayed to the witnesses were available for cross-examination purposes at the trial, that there was no showing of influence by the investigating officers, that the witnesses had an adequate opportunity to view the crime, and that the descriptions by the witnesses were accurate. (Petition for Certiorari, C-4, 5.)

Defendant did not seek hearing before the California Supreme Court.

In habeas corpus proceedings, defendant again raised this issue, and for the first time complained that his counsel was incompetent for failing to object to the identification evidence at trial. The California Superior Court, Court of Appeal, and Supreme Court denied these habeas corpus petitions without opinion.

B. Proceedings in Federal Court

1. The District Court

The district court failed to discuss or make any findings with respect to our section 2254(d) argument. The court also rejected our argument that defendant's claims were beyond federal review because of his procedural default. The district court proceeded to the merits of the eyewitness

identification claim and, based upon the same state court record, denied the petition after stating somewhat cryptically that "petitioner has established that irregularities occurred in the pretrial photographic identification of petitioner by witnesses Almengor and Allen." (Petition for Certiorari, D-3.) The court concluded that these irregularities did not taint the in-court identifications by the witnesses and further concluded that even if the testimony of Allen was tainted, the positive identification by Childress and the strong identification by Almengor made the error harmless beyond a reasonable doubt. The court also found that trial counsel was not incompetent for failing to litigate the identification issue because the claim was "at best arguable, and that any error was harmless beyond a reasonable doubt." (Petition for Certiorari, D-3.)

2. The Court of Appeals

The Ninth Circuit's opinion not only failed to acknowledge our section 2254(d) argument, but also did not review the district court's findings. Instead, after reviewing the trial court record, the court found itself "driven to the conclusion that the photographic identification procedures was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (Petition for Certiorari, A-11.)

C. Evidence Presented At Trial

1. The Murder

Rumor that the victim, Leonard Arias, was being transferred to the California Correctional Institution at Tehachapi preceded his arrival. (RT 638-639, 1162.) Arias,

a member of the "Nuestra Familia" stabbed a member of the rival "Mexican Mafia" while incarcerated at San Quentin; in retaliation, the "Mexican Mafia" put out a "contract" on his life. (RT 823, 955.)

Carlos Ortega, Chief of the "Mexican Mafia" at Tehachapi, testified that defendant Mata, and his two codefendants Gallegos and Vargas were "Mafia" members. (RT 811-812, 834-844.)

Mata informed Ortega that Arias had arrived and that they were ordered "to hit" him. (RT 822-824.) Ortega told Mata that he did not want any trouble. (RT 824.) The following day, October 19, 1972, Ortega met Mata and Gallegos, who wanted to "get down," meaning arm themselves with knives and stab Arias. (RT 827-828.) Vargas joined them and said "We've waited long enough." (RT 828-829.) Mata and Gallegos left and returned about 10 minutes later. Mata, wearing black gloves, tried to give Ortega a knife but Ortega refused. (RT 829-830.) Mata said he had another knife inside his belt. (RT 831.) When Ortega said he did not want trouble Vargas called him a "crybaby."

Joe Escobar, an officer of the Nuestra Familia, observed the three defendants talking with Ortega before proceeding toward dorm 8. (RT 1175-1176.) All three were wearing watch caps, and Mata and Gallegos were wearing gloves and blue levi jackets. (RT 1176.)

In dorm 8, the victim was socializing with his hometown friend, Jay Allen, and a new acquaintance, Rigoberto Almengor. (RT 583-584, 600.) Paul Childress, another inmate who lived in dorm 8, knew Mata from a prior drug dealing and noticed him standing by the bulletin board in the dorm.

(RT 268, 273.) He also observed Gallegos walking in the dorm. (RT 271-272.)

At about 1:30 p.m., a call came over the institution's loudspeaker ordering all new arrivals to report to the prison laundry room. (RT 408.) The victim, accompanied by Allen and Almengor started out. (RT 372-373, 583.) There was daylight in the dorm and visibility was excellent. (RT 801, 947.)

Almengor saw two inmates standing by the bulletin board and a third leaning against a nearby wall. They did not live in dorm 8, and he did not know them, but had seen Vargas before dealing drugs. (RT 374, 745, 957-958, 966.) Allen also saw the three men. (RT 795.) Allen knew Mata since they once resided in the same dorm. (RT 595.) In tape recordings made during the eleven days following the killing, both Allen and Almengor described all three as wearing black leather gloves, state issued jackets and pants and navy blue knit beany caps. (RT 621-622, 746, 969.) Allen thought all three men had mustaches. (RT 621.) Almengor described one assailant as dark complected, with a small, thin mustache, and Vargas as "an Indian dude" with a thicker mustache who was taller than the other two. (RT 479, 961, 970.)

As Almengor, Allen and Arias got closer, the three defendants pulled their hands out of their coats and attacked Arias with knives. (RT 958.) Two of the knives were small, one was long. (RT 961.) Vargas, armed with the long knife, pulled down Arias' shoulder and stabbed him. (RT 749, 795-96, 959.) Vargas jabbed at Allen, and ripped his jacket. (RT 796.)

Meanwhile, in the midst of this attack, Almengor turned forward, he and Mata made eye contact, and Mata came at him with a knife in his right hand. (RT 379, 747, 960.) Mata swung twice, and Almengor tried to kick the knife out of his hands. (RT 380.) They fought with their fists, swinging several times at each other. (RT 380, 747, 960.)

As Mata backed off, they stood there "looking directly at each other." (RT 960.) Turning his attention back to the stabbing, Almengor heard and saw a knife fall to the floor, and saw Arias falling. (RT 381-382, 747-748.) Almengor again looked Mata in the face, motioning that he wanted nothing to do with this. (RT 382.) Mata seemed to understand, he turned around and ran out the door, followed by his codefendants. (RT 383, 748, 960.)

Childress testified that as he came out of the bathroom area he heard scuffling and observed Arias, Mata, Gallegos and Vargas fighting. (RT 275, 279.) He did not see Allen or Almengor. (RT 303.) Childress thought it was just a fight until he saw a small silver knife fall to the floor. (RT 276.) He then returned to his bunk area. (RT 281.)

Allen's screams finally drew the attention of Officer Loomis. Allen yelled, "a guy has been stuck, get an ambulance." (RT 236.) Loomis opened his office door and dialed control for assistance. (RT 237.)

One and one-half minutes after hearing the fight in dorm 8, inmate Juan Olvera saw Gallegos coming from nearby dorm 6. (RT 512.) Gallegos was in a hurry and told Olvera, "If they ask about me, tell them I've been with you for the last hour." (RT 513.) Gallegos was nervously clenching a pair of black leather gloves. (RT 514.) A short time later,

Joe Escobar saw Gallegos in the library. Gallegos seemed very different—pale and excited. Olvera saw Gallegos and another inmate exchanging a magazine containing a piece of shiny metal. (RT 1179.) From Gallegos' gestures, Escobar knew something had happened to Arias. (RT 1178-1180.) At that moment recall sounded. (RT 1180.) At about 2:00 p.m., a search of the institution was conducted. (RT 658.) A knife was discovered in the trash can of dorm 5, and a blue levi jacket with blood on the sleeve was found under bunk 56 of that dorm. (RT 659, 660-661.) Almengor testified that this knife looked like Mata's knife. (RT 380.) Mata resided in bunk 60 of this dorm. (RT 658, 662.) A long, prison-made knife was found on the stairway to dorm 8, and a broken grass shear blade was found on the floor between the door of dorm 8 and the spot where Arias' body had fallen. (RT 668-670.) Bloody pants and shoes belonging to Almengor were found in his dorm. (RT 963-964.)

The following day, Paul Childress was approached by several inmates of Mexican descent who asked to read his magazines. He had never spoken with these inmates before and felt uneasy about their approach. (RT 283-284, 952.) Later that afternoon, he saw two of the defendants walking around in the yard below. He was frightened because he knew that they had seen him. (RT 948-949.) As he walked toward the prison control, Childress was followed by four or five inmates, one of whom appeared to be Mata. (RT 284, 949.)

Childress asked to speak to the officer in charge, and was escorted to Sergeant Mills' office. (RT 284). He told Mills what he had seen, identifying Mata and Gallegos by name.

(RT 285, 693, 947-948.) Childress identified photographs of Mata and Gallegos. (RT 285-286, 676, 681.) After looking at about seventy photographs from dorms 5 and 7, he finally identified Vargas' picture from the photos of inmates in dorm 6. (RT 681-682.)

On October 20, Gallegos was en route to another institution with Ortega and several other inmates. (RT 836-837.) Ortega testified that Gallegos admitted, "My knife broke when I hit him. We all worked out on it." (RT 838.)

At trial, Allen and Almengor made definite in-court identifications of Mata and Gallegos, but repudiated their pretrial identifications of Vargas and would not identify him in court. (RT 375, 404, 418-419, 425-426, 587, 597, 623-624.) Defendant's defense was alibi. He offered three witnesses who testified that he was on his own bed playing cards near the time that the stabbing occurred. (RT 1016, 1106, 1131.)

2. The Pretrial Identification Procedures

October 19, 1972

Allen and Almengor were both interviewed the evening of the stabbing. (RT 710, 719-720, 914, 923-924.) Allen asserted an inability to make any identifications and was not shown any photographs. (RT 719-720, 924.) Almengor asked to be shown photographs of the Mexican population on the medium side of the facility, and was shown the rollodex of about 200 photographs of all inmates on that side. (RT 397, 914, 959.) Almengor named "Bogus" Pete Nunez as one of the assailants—a name provided to him by other inmates based upon his description. (RT 399-400.

711.) Almengor identified the photograph of Nunez but was not positive saying it looked similar to the assailant. (RT 398-400, 711, 780-781.) He also tentatively identified defendant Vargas, and inmates Ramirez and Reymundo. (RT 914-915.) Almengor testified that he selected eight photographs as bearing similarity to the three assailants. (RT 401, 466.) Almengor requested larger, more recent photographs. (RT 401.) Almengor also requested a line-up, which prison officials agreed to provide; however, the line-up never occurred and Almengor never renewed his request. (RT 497, 781.)

October 27, 1972

Thereafter, major prison inmate disturbance prevented contact with Allen and Almengor for the purpose of making identifications until October 27, 1972. (RT 725, 927.)

Allen was shown a group of photographs (Exhibit 23)[1a] including pictures of Mata, Gallegos and Vargas. The names of the inmates were concealed. (RT 720.) Allen again claimed an inability to make an identification, complaining that the photographs were too old. (RT 720-721, 924.)

Almengor also viewed Exhibit 23 with the names of the inmates concealed. (RT 715.) Outside Allen's presence, Almengor again tentatively identified defendant Vargas. (RT 437, 959.) He asked for more recent photographs, feeling that the appearance of inmates represented in the photographs had changed. (RT 716, 959-960.)

[1a]Exhibits 23 and 24, the photographic spreads in question, were transmitted to this Court by the Clerk for the United States Court of Appeals for the Ninth Circuit on April 15, 1980.

Acting on this request, a number of inmates were photographed but due to a mistake by the photographer, the pictures did not come out. (RT 716.) The three defendants were photographed a second time, and other photographs were reproduced to the same size. (RT 716.) All fifteen photographs which are included in Exhibit 24 are black and white, and are the same size, have the same quality of "newness" and are of inmates of Mexican descent.

Defendant asserts that Almengor and Allen knew that new pictures of the suspects had been taken. Almengor testified that he knew Gallegos was being photographed but was unaware Mata and Vargas were with him; Allen testified at trial that he was unaware that any of the three were being photographed. (RT 444-446.) Private investigator Faulkner testified that Allen told him the following: that Allen identified defendants because they were the only ones in segregation whose pictures appeared in the photographic display and he was under Department pressure to make an identification; that he did not observe the assailants well enough to identify them; that only one assailant had a mustache and that they could have been Caucasian. (RT 1118-1119.) Allen testified that he did not recall making these statements. (RT 634, 645-646.)

Defendant also attacks the photographic display, asserting that the defendants were posed identically, and were the only ones in prison clothing wearing mustaches. Exhibit 24 contains seven other inmates with mustaches, three of whom are also wearing prison clothing: G. H. Delgado, M. S. Medina and J. A. Ortiz.

October 30, 1972

On October 30, 1972, Almengor and Allen were shown the group of photographs introduced as Exhibit 24. First Almengor was shown the display with the inmates' names concealed; he identified Mata, Gallegos and Vargas. He was able to identify Mata because "he was looking at me eye to eye, you know, at the time of the stabbing, at the time of the stabbing when he backed up." (RT 742.)

Allen was brought in next, and while Almengor stood on the other side of the room, Allen likewise identified Mata, Gallegos and Vargas as the assailants. (RT 722.) Allen testified that when he was first shown pictures he did not make any identifications because he did not want to get involved. (RT 650.) His identifications were based upon his observations at the scene, and the correctional officers did not influence his identifications. (RT 650.)

SUMMARY OF ARGUMENT

Defendant made a tactical decision to withhold objection to identification testimony at his state trial. Dissatisfied with his murder conviction, he urged on direct appeal that two eyewitness identifications were tainted by suggestive pretrial procedures. The state appellate court rejected this claim, holding these procedures to be "inherently fair." On federal collateral review of this issue a circuit court majority ignored the state appellate court factfindings as well as the district court decision and reversed the conviction, based upon its own *de novo* factfindings drawn from the same "cold" state court record.

Two doctrines which serve to limit unwarranted federal reversals of legitimate state court convictions have been violated. One is the rule which bars federal habeas corpus review to a state prisoner who has failed to raise issues in state court in compliance with state procedural rules absent a showing of "cause" and "prejudice". *Wainwright v. Sykes* 433 U.S. 72 (1977). The other is the requirement that federal habeas corpus courts defer to state court factual findings rendered after full and fair hearings. *La Vallee v. Delle Rose* 410 U.S. 690 (1973); 28 U.S.C. § 2254(d).

Defendant's tactically motivated procedural default which does not satisfy the *Wainwright* "cause" and "prejudice" standard was not excused by the state appellate court when it rejected defendant's identification contention. California's contemporaneous objection rule does not preclude this gratuitous consideration. Rather, it holds that there shall be no reversal of a judgment absent a timely and specific objection. It follows that absent a reversal or an expressed intent to forgive a procedural default, a California appellate court does not forgive this procedural default by stating reasons for the rejection of a claim.

If it is determined that the state appellate court forgave the default by reaching the merits, the state appellate court's resolution of the facts must be accorded the statutory presumption of correctness. First, it is intolerably inconsistent to hold that a state appellate court opinion has the force of removing a bar to federal review but has no substantive meaning. Next, both the letter and spirit of section 2254(d) compel the conclusion. Finally, federal law supports this result.

The Court of Appeals applied an incorrect standard in determining whether the pretrial identification procedures gave rise to a very substantial likelihood of irreparable misidentification. In following a two-part approach, first equating lack of "necessity" for use of photographic identification procedures with a finding of impermissible suggestiveness the court departed from the decisions of this Court and of the majority of other federal and state courts. It gave considerable weight to a factor which has no bearing on the reliability of the eyewitness evidence and no relation to the function of the Due Process Clause in the area of identification evidence. The second part of the Court of Appeals' "two-part approach" failed to follow the standards previously established by this Court's cases. Application of this erroneous standard predictably led the court to an erroneous result.

ARGUMENT

I

DEFENDANT'S PROCEDURAL DEFAULT SHOULD BAR CONSIDERATION OF HIS CLAIM AND AT THE LEAST, THE STATE APPELLATE COURT'S FACTFINDINGS SHOULD BE ACCORDED A PRESUMPTION OF CORRECTNESS

A. Defendant's Procedural Default Should Bar His Claim in Federal Court

At trial, defendant did not object to his in-court identifications by the three eyewitnesses, Childress, Almengor and Allen. However, the reliability of these identifications was the focal point of defendant's trial. The photographic displays were introduced into evidence; the eyewitnesses were

examined and cross-examined extensively as to their observations and the identification procedures employed; the correctional and law enforcement officials who conducted the pretrial identification procedures gave detailed accounts of them; tape recorded conversations of the three eyewitnesses with the authorities made at or near the time of these pretrial identifications were introduced into evidence; defense counsel argued in summation that these identifications were unreliable.

Why did defense counsel, who demonstrated an understanding of the legal concept of suggestive pretrial identification procedures, fail to object? The defense chose to use Almengor and Allen to impeach Childress' identification. Paul Childress approached Albert Mills, a correctional officer and told him he saw the three men who stabbed the victim. Childress knew and named defendant Mata to Mills (RT 285, 693, 947-948). Given this identification, the only available tactic was impeachment. Inconsistencies existed between Childress' testimony and that of eyewitnesses Almengor and Allen, most notably that Childress claimed a clear view of the assault but said he did not see Almengor and Allen at the murder scene. Defense counsel argued that Childress did not see Almengor and Allen because he did not witness the stabbing scene; and that Allen and Almengor were at the scene but their identifications resulted from suggestive pretrial identification procedures and were unreliable (RT 1332-1338).

Faulty identification was the heart of this defense. The thoroughness with which defense counsel explored the pretrial identification procedures, and the use of this evidence

to impeach Childress' identification leads ineluctably to the conclusion that a trial court objection was deliberately withheld, a tactical decision which satisfies the deliberate bypass test of *Fay v. Noia,* 372 U.S. 911 (1963) and, *a fortiori,* fails the "cause" and "prejudice" standard of *Wainwright v. Sykes,* 433 U.S. 72 (1977).

To excuse defendant's procedural default is to award him a windfall second trial. At trial he withheld his constitutional claim for his own benefit; dissatisfied with the verdict, he convinced the federal Court of Appeals on collateral review that the admission of those identifications requires reversal. We submit the Great Writ was not intended to reduce a state criminal trial to a "dry run."

Nor should federal courts deem the state appellate court's rejection of this claim on the merits a relief from default.

The District Court held that defendant's three claims[1] were not barred from federal review either because they were raised on direct appeal or because, on state collateral review a summary denial is assumed by federal courts to be a decision on the merits. *Thompson v. Procunier,* 539 F.2d 26, 28 (9th Cir. 1976); Petition for Writ of Certiorari, D2-D3.

The Ninth Circuit, in concert with many circuits, holds that by addressing a claim on the merits, a state appellate court is deemed to waive any procedural default by a fed-

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[1]Those three claims include: (1) admissibility of the identifications presently before this Court; (2) incompetency of counsel for failing to object to the in-court identifications; (3) a discovery issue. Only the first two issues were pursued before the Court of Appeals for the Ninth Circuit.

eral habeas applicant. *See Curry v. Wilson,* 406 F.2d 110, 111-112 (9th Cir. 1968).

This rule rests upon footnote 3 of *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 297, n.3, (1967):

> "The State claims that, since Hayden failed to raise the search and seizure question at trial, he deliberately bypassed state remedies and should be denied an opportunity to assert his claim in federal court. See *Henry v. Mississippi,* 379 U.S. 443; *Fay v. Noia,* 372 U.S. 391. Whether or not the Maryland Court of Appeals actually intended, when it reversed the state trial court's denial of post-conviction relief, that Hayden be afforded a hearing on the merits of his claim, it is clear that the trial court so understood the order of the Court of Appeals. A hearing was held in the state court, and the claim denied on the merits. In this circumstance, the Fourth Circuit was correct in rejecting the State's deliberate-bypassing claim. The deliberate-bypass rule is applicable only 'to an applicant who has deliberately by-passed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.*' [Emphasis in quote.] But see *Nelson v. California,* 346 F.2d 73, 82 (C.A. 9th Cir. 1965)."

The state action confronting this Court in *Warden* included a reversal of conviction by the Maryland appellate court, and a new hearing on the merits by a trial court that understood the reversal to require that Hayden be afforded a hearing on the merits of his claim. While this state action meant that Hayden had not "forfeited his state court remedies" within the meaning of *Fay v. Noia, supra,* we submit

not all action taken by a state appellate court forgives a defendant's procedural defaults.

Agreeing on this point, the Second Circuit in *Brathwaite v. Manson*, 527 F.2d 363 (2d Cir. 1975), suggested that not all kinds of state court review estop the state from asserting a "deliberate by-pass" resulting from the breach of its contemporaneous objection rule. The court explained:

> ". . . It is, of course, true that plenary consideration of such an objection by a state appellate court meets the exhaustion requirement even though, under ordinary procedural rules, the court was not obliged to give this. However, our reading of its opinion leads us to believe that the Supreme Court of Connecticut considered the point on a more limited basis, namely, whether even if petitioner's objections were sound, 'substantial injustice resulted' from receipt of the indentifications. It is doubtful whether such limited review would meet the exhaustion requirement if Connecticut provided a method for raising the federal claim in a collateral attack . . . [and] [f]or the same reason, namely, the State's failure to raise the point here, we need not consider whether *Fay v. Noia, supra*, 372 U.S. at 426-34, 438-40, 83 S.Ct.822, would be read today as relieving Brathwaite, in federal habeas, of his counsel's procedural default, even though, for the reason indicated above, we doubt whether the Connecticut Supreme Court's limited consideration of Brathwaite's objections would bring the case within the principle of *Warden v. Hayden* 387 U.S. 294, 297 n.3, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), that a state may not assert 'deliberate by-pass' when a petitioner's constitutional claims have in fact been passed upon by a state court despite breach of a contemporaneous objection rule." *Id.* at 366.

When *Manson v. Brathwaite* 432 U.S. 98 (1977) reached this Court, the merits of the identification issue were addressed because petitioner Manson asserted no claims relating to respondent's failure to make a contemporaneous objection:

> "Although no objection was made in the state trial to the admission of the identification testimony and the photograph, the issue of their propriety as evidence was raised on the appeal to the Supreme Court of Connecticut. Petitioner has asserted no claims related to the failure of the respondent either to exhaust state remedies or to make contemporaneous objections. The District Court and the Court of Appeals, each for a somewhat different reason, App. to Pet. for Cert. 7a-8a; 527 F.2d, at 366, concluded that the merits were properly before them. We are not inclined now to rule otherwise." *Id.* at 103, n. 7.

We ask this Court to find that defendant's failure to object to the in-court identifications admitted at trial results in procedural default of the issue regardless of the state appellate court's rejection of this claim on the merits.

From the standpoint of California statutory law we submit defendant's procedural default was not forgiven.

California's contemporaneous objection rule, codified in 1965, provides:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was

timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." West's Annotated California Codes, Evid. Code § 353.[2]

There exists abundant California authority upholding this principle and its application to in-court identification testimony. *People v. De Santiago* (1969) 71 Cal.2d 18, 22 [76 Cal.Rptr. 809]; *People v. Robinson* (1965) 62 Cal.2d 889, 894 [44 Cal.Rptr. 762]; *People v. Colligan* (1979) 91 Cal. App.3d 846, 850 [154 Cal.Rptr. 389]; *People v. Suttle* (1979) 90 Cal.App.3d 572, 580 [153 Cal.Rptr. 409]; *People v. Boothe* (1977) 65 Cal.App.3d 685, 690 [135 Cal. Rptr. 570]; *People v. Johnson* (1974) 38 Cal.App.3d 1, 6 [112 Cal.Rptr. 834]; *People v. Hoiland* (1971) 22 Cal. App.3d 530, 541 [99 Cal.Rptr. 523]; *People v. Dobson,* 12 Cal.App.3d 1177, 1181-1182 [91 Cal.Rptr. 443]; *People v. Young* (1970) 9 Cal.App.3d 106, 109 [87 Cal.Rptr. 767];

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[2]See also Penal Code section 1259 which states: "Upon an appeal taken by the defendant, the appellate court, may without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done *after objection made in and considered by the lower court,* and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby. (Emphasis added.)"

People v. Hawkins (1970) 7 Cal.App.3d 117, 124 [86 Cal. Rptr. 428].[3]

California Evidence Code section 353 prevents an appellate court from forgiving a procedural default based upon lack of compliance with this contemporaneous objection rule. Section 353 provides in mandatory language that there shall be no reversal of a judgment absent a timely and specific objection. The California Legislature by use of this language has placed a substantive limitation on judicial review, as an appellate court cannot reverse a conviction in the absence of compliance with this statutory provision, and hence it is without jurisdiction to forgive this procedural default.

Even if a state reviewing court has the jurisdiction to reverse absent compliance with this statute, the action taken by the Fifth District Court of Appeal did not forgive defendant's procedural default. For the statute does not

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[3]The application of the contemporaneous objection rule to in-court identification testimony reflects a persistent theme running through the case law of both this Court and the California courts regarding the nature of such evidence.

> "It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process.
>
> Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi." *Manson v. Brathwaite*, 432 U.S. 98, 113-114, n.14 (1977) (citations omitted). See *People v. Lawrence* (1971) 4 Cal.3d 273 [93 Cal.Rptr. 204].

preclude a court from gratuitously setting forth its reasons for rejecting a claim as meritless; rather, it provides for no reversal of the judgment. Thus, it follows that a court does not forgive a procedural default unless that court reverses a judgment despite the default. Accordingly, justifying a federal reversal of a state conviction on grounds that the state court's affirmance on the merits reflects its disinterest in enforcing state procedural rules is, at best, self-indulgent fiction.

A recent change in federal law reinforces our view. In *Wainwright v. Sykes,* 433 U.S. 72, 89 (1977), this Court rejected the deliberate by-pass standard announced in *Fay v. Noia* and acknowledged that *Fay v. Noia* put state appellate courts in a very difficult position:

> "The refusal of federal habeas courts to honor contemporaneous objection rules may also make state courts themselves less stringent in their enforcement. Under the rule of *Fay v. Noia,* state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal.
>
> Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas court will decide the question without the benefit of their views." *Id.* at 89-90.

Justice Brennan's dissent likewise perceives that collateral review afforded by *Fay* has a bearing on the states' selection and enforcement of procedural requirements, since a state concerned about its "primary factfinding role as authorized by § 2254 and *Townsend v. Sain,* 372 U.S. 293

(1963)" is forced to "liberalize" and "streamline" state rules that "otherwise might serve to bar such state participation." *Id., Dissent,* p.111, n.10.

In response to *Fay's* opening the doors to federal collateral attack, state appellate courts attempted to protect convictions from federal court scrutiny to the greatest extent possible by setting forth their reasons for the rejection of a claim. This Court closed those doors somewhat in *Wainwright v. Sykes.* This state court device, made necessary by *Fay,* should not now be transmogrified into the key which reopens those doors. For this reason, we conclude that unless a California court opinion expresses the intent to forgive a procedural default, its explanation for rejecting a claim on its merits should not be deemed a waiver of state procedural rules.

B. If The State Appellate Court Opinion Is Deemed to Waive Defendant's Procedural Default, It Must Be Accorded The Statutory Presumption Of Correctness In Federal Court

If defendant's failure to object at trial to in-court identifications is deemed forgiven by federal courts because a state appellate court addresses the merits of the claim, the state appellate court must then be treated as the factfinder for purposes of federal review. A contrary rule: (1) promotes discord between the state and federal systems by taking the incongruous position that the written words of a state appellate court have the force of removing a bar to federal review but are otherwise meaningless in federal court; (2) violates the letter and spirit of section 2254(d); and (3) contravenes existing federal law.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court demonstrated a willingness to accept the burden of state appellate court presumptive validity when the benefit of federal collateral review flows from a state appellate court decision. This assumption is implicit in the majority's observation that an appellate court passes on issues for the first time to give the federal habeas court the benefit of their views. *Id.* at 89-90. The dissent was more explicit, noting that states will relax enforcement of procedural rules "to the extent that a state desires to have input into the process of developing federal law, and seeks to guarantee its primary factfinding role as authorized by § 2254 and *Townsend v. Sain*, 372 U.S. 293 (1963)." *Id.*, dissent, at 111 n.10.

Section 2254(d) provides in part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . ."

The literal requirements of this section are satisfied by an appellate court serving as the state's factfinder: An appellate court is a State court of competent jurisdiction; both the State and the habeas applicant are parties to an appeal; the appellate court's decision is evidenced by a written opinion; the appellate court's determination is made

after a hearing on the merits of a factual issue which includes the trial court record, the written briefs of both parties arguing the merits of a claim, and an oral argument, unless waived by both parties. *People v. Brigham* (1979) 25 Cal.3d 283, 599 P.2d 100, [157 Cal.Rptr. 905]; California Rules of Court, Appellate Rules 13, 14, 22, 23.

Likewise, the congressional intent underlying the presumption created by section 2254(d) can be satisfied only by our construction of this provision.

The Senate Judiciary Committee's report reveals the purpose of section 2254(d):

> "In their report to the Judicial Conference of the United States, the Habeas Corpus Committee, composed of Circuit Judges Simon E. Sobeloff, Phillip Forman, Luther M. Swygert, J. Skelly Wright, and Orie L. Phillips (Chairman), wrote:
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> > 'It is the opinion of your committee that the proposed legislation, if enacted, will be a strong inducement to the States that have not already done so to provide adequate postconviction remedies and procedures and to make and keep available records of evidentiary matter in criminal proceedings to safeguard the constitutional rights of defendants.' " Senate Report (Judiciary Committee) No. 1797, Oct. 18, 1966.

Following a procedural default in a trial court, if appellate factual findings are not accorded a presumption of correctness, a state appellate court has no incentive to review a defendant's constitutional claims. Thus, a defendant is left without this state postconviction remedy and, ultimately, is left without federal review of federal claims.

Circuit courts unanimously accord presumptive validity to a state appellate court finding of a basis for an in-court identification independent of pretrial procedures.

In *United States ex rel. Harris v. State of Illinois,* (7th Cir.) 457 F.2d 191, *cert. denied,* 409 U.S. 860 (1972), petitioner objected to his in-court identification at trial, the trial court found the pretrial procedures violated *United States v. Wade,* 388 U.S. 218, 240-241 (1967), and admitted the in-court identification utilizing an improper evidentiary standard placing the burden on defendant to prove the in-court identification was not of an independent nature. Petitioner urged this error upon the Illinois Supreme Court, requesting a reversal of his conviction, or at least, remand to the trial court to hold a hearing on the independence of the in-court identification utilizing a proper evidentiary standard. The Illinois Supreme Court made no recognition of this contention other than by finding itself, after a brief review of the circumstances, that the in-court identification had an origin independent of the pretrial identification.

> "Because the Supreme Court of Illinois made such a finding of independence, this Court must determine if a reviewing court which does not hear testimony and which only has a cold record in front of it may properly make such a factual determination concerning the constitutional guarantee recognized by *Wade* . . . While we believe that the trial court is the most proper place for that determination to be made, we cannot conclude that such a resolution by a reviewing court when the record is adequate amounts in and of itself to any constitutional deprevation. We thus conclude that, so long as the record was adequate for such action,

the Illinois Supreme Court could, under *Wade* and *Gilbert,* determine if the in-court identification had an independent basis. . .

Section 2254(d) of Title 28 of the United States Code likewise focuses our attention on the appellate record. That section compels a federal court to presume as correct any determination on the merits of a factual issue made by a state court after a hearing in proceedings to which the applicant for the writ and the state were parties, unless the federal court concludes that such determination is not fairly supported by the record." *Id.* at 195-196.

Similarly, the First Circuit in *Souza v. Howard* (1st Cir. 1973) 488 F.2d 462, *cert. denied,* 417 U.S. 933 addressed appellant's contention that a state appellate court is not a state court trier of fact within the meaning of *Townsend* or a state court of competent jurisdiction on a factual issue within the meaning of § 2254(d).

"Appellant's position on this issue cannot be reconciled with the action taken by the Supreme Court in *Neil v. Biggers, supra* where it held that although a pre-trial identification might have been suggestive, nevertheless, under the totality of circumstances, the witness' in-court identification was reliable. There, in passing on the cold record, the author of the majority opinion said:

'. . . Weighing all of the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.' [409 U.S. page 201, 93 S.Ct. page 383.]

Only two jurisdictions have passed directly on the subject and they have decided adversely to appellant's

> contention. They held that a reviewing court has authority to decide on the record the independent sources of in-court identification. *United States ex rel. Harris v. State of Illinois,* 457 F.2d 191 (CA7 1972); *United States v. York,* 138 U.S.App.D.C. 197, 426 F.2d 1191, 1193 (1969); *Clemons v. United States,* 133 U.S.App. D.C. 27, 408 F.2d 1230, 1248 (1968). In those cases, the courts of appeals concluded that there is no sound reason why a state appellate court, when the record is adequate, should not make findings on the issue." *Souza v. Howard, supra,* 488 F.2d 462 at 468.

This leads us to the conclusion that the presumption of correctness must apply if the state court record satisfies the requirement of § 2254(d) and *Townsend v. Sain,* 372 U.S. 293 (1963).

This Court held in *Townsend* that ". . . a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." 372 U.S. at 313. Here, neither the District Court nor the Court of Appeals held an evidentiary hearing, despite an invitation to do so by defendant. Supplemental Points and Authorities in Support of Petition for Writ of Habeas

Corpus filed April 12, 1978. Since an evidentiary hearing must be held where circumstances indicate state court factual findings may be unreliable, implicit in the failure of these courts to hold an evidentiary hearing, is their determination that the state court record is adequate as a basis for reliable factual findings.

It is quite clear, however, that the Ninth Circuit did not accept the state court's factual findings. The state found no showing of influence by the investigating officers, yet the Ninth Circuit found that "considerable pressure from both the prison officers and opposing prison factions had admittedly been brought to bear on both witnesses." Petition for Certiorari, A-10. The state's finding is supported by the record and is not clearly erroneous: while the witnesses were encouraged to make an identification, the pretrial procedures were fair and did not suggest a particular identification.

The Ninth Circuit found that the photographic display was unfair in that prior "mistaken" selections had been removed, the number of photographs drastically reduced, and only new photographs of appellant and his co-defendants were included. Petition for Certiorari, A-10. The state court concluded that the procedures were inherently fair but noted that any possibility of prejudice could be brought out given the preservation and availability of the photographs at trial. The state's finding is supported by the photographic spreads of October 27 and 30: they are not impermissibly suggestive on their face, the absence of photographs of Ramirez, Reymundo and Nunez do not render the October 30, spread suggestive since fifteen pho-

tographs remained, and defendant Mata's appearance in both exhibits does not suggest his identification, since his appearance had changed so drastically. In short, the photographic spreads did not focus attention upon defendant.

The Ninth Circuit also rejected the state's determinations that the witnesses had an opportunity to view the crime and that their descriptions were accurate. Instead, the Ninth Circuit found the identifications untrustworthy because "the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention." Petition for Certiorari, A-9. While the federal court's finding is based upon speculation, the state court's finding is supported by the record. Allen already knew Mata since, at one time, they resided in the same dorm. Almengor testified that he and Mata stared at each other, fought with each other, and communicated with each other. The lighting conditions were excellent. The witnesses described the clothing, facial hair, physical features and race of the assailants as well as the weapons they were carrying. These descriptions were accurate and sufficiently detailed. The first time a photograph reflecting defendant's true appearance was presented to the witnesses they identified him and their identifications were certain. For these reasons, we conclude that the state court's findings are supported by the record and are not clearly erroneous.

II

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD IN EVALUATING DEFENDANT'S CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BY USE OF PRETRIAL IDENTIFICATION PROCEDURES

The Court of Appeals held that a court should follow a "two-part approach" in determining whether a conviction based on eyewitness identification testimony should be set aside on the ground that a pretrial photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 611 F.2d at 757. The first part of this approach involved consideration of the "*necessity* of the photographic identification procedures." *Id.* The second part of the approach involved consideration of "'whether there was a very substantial likelihood of irreparable misidentification.'" *Id.* at 758 (citation omitted).

We submit that the Court of Appeals' "two-part approach" is inconsistent with the approach developed in this Court's cases and applied by the vast majority of other federal and state courts. Its application in this case resulted in an erroneous conclusion that defendant was denied due process of law by reason of the pretiral photographic identification procedures employed.

A. The Availability of a Defendant for a Physical Lineup Does Not Render the Use of Photographic Identification Procedures Constitutionally Suspect

Since defendant Mata was a state prison inmate at the time the photographic identification procedures were utilized, the Court of Appeal quickly concluded that there was

no necessity for their use.[4] This conclusion was apparently based on tacit assumptions that "necessity" could not be shown in a situation where the suspect was in custody and that the burden of showing "necessity" was on the prosecution, even in the absence of an objection to the admission of the identification evidence. Neither of these assumptions is supported by any cogent reason. Furthermore, the court's conclusion overlooks the fact that the state court record suggests valid reasons why resort to photographic identification procedures was required. As stated in the dissenting opinion of Judge Sneed, the case arose in the unique world of a prison. 611 F.2d at 760-761. The inmate witnesses were understandably reluctant to come forward and be identified as informants. Moreover, there was evidence showing that there was a major inmate disturbance at the prison before and during the time the identification procedures were conducted. Under these circumstances, the Ninth Circuit's conclusion of lack of necessity was not supported by the record.

Discussing the weight to be given lack of necessity, the court held:

> "While lack of necessity is not a *per se* ground for rejection of the identification, we have consistently

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[4]The court gratuitously assumed from the state court record that use of photographic identification procedures, instead of a corporeal lineup, "stemmed from the reluctance of the prison officials to provide [defendant Mata] with the assistance of counsel which would be required in a line-up procedure." 611 F.2d at 759, n. 1.

This statement does not account for the fact that the right to counsel at a lineup comes into being only when a person has been formally charged with a criminal offense. *Kirby v. Illinois*, 406 U.S. 682 (1972). The initial accusatory pleading in this case was not filed until November 6, 1972 (CT 4), well *after* the identification procedures in issue here.

held that necessity is an important factor to be considered in judging the validity of the identification procedures." *Id.* at 757 (citations omitted).

Nothing in this Court's 1967 trilogy of cases regarding pretrial identification procedures, *United States v. Wade* 388 U.S. 218 (1967); *Gilbert v. California* 388 U.S. 263 (1967); and *Stovall v. Denno* 388 U.S. 293 (1967), supports a conclusion that lack of "necessity" for use of a particular procedure for pretrial identification enters into the assessment of whether the procedure actually used violated the suspect's due process rights. *Stovall* was the first case in which this Court expressly recognized that a conviction could be attacked on the ground that a confrontation between the defendant and a witness was so unnecessarily suggestive and conducive to irreparable mistaken identification as to result in a denial of due process of law. It is true that in *Stovall,* which involved the "widely condemned" practice of showing a single handcuffed suspect to a witness, the Court stressed that there was no practical alternative under the circumstances. *Id.* at 302. However, the Court's brief discussion of whether that confrontation resulted in a denial of due process did not articulate a detailed standard to be applied in determining such claims.[5]

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[5]The Court's discussion of this issue stated only that the "totality of the circumstances" surrounding the confrontation must be examined and that, under the circumstances of this case, an immediate confrontation in the witness' hospital room was "imperative." A portion of the en banc opinion of the Court of Appeals for the Second Circuit, *United States ex rel. Stovall v. Denno* 355 F.2d 731, 735 (2nd Cir. 1966), is quoted in support of this latter statement. The Court of Appeals' opinion also contained an extensive discussion of other "circumstances" which led it to reject the defendant's due process claim. These included such matters as the wit-

In short, *Stovall* does not hold, or even suggest, that lack of "necessity" for use of a particular procedure would weigh in favor of a finding that the suspect's due process rights were violated.

In *Simmons v. United States* 390 U.S. 377 (1968), the first of this Court's cases dealing with a pretrial identification by photograph, the Court framed one of the issues before it as whether the "pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive of misidentification as to deny [the defendant Simmons] due process of law." *Id.* at 381. In the course of its opinion the Court noted that, despite the hazards of initial identification by photograph, "this procedure has been used widely and effectively in criminal law enforcement. . . ." *Id.* at 384. Thus, the Court was unwilling to prohibit the use of photographic identification procedures, either in the exercise of its supervisory power over the lower federal courts or as a matter of constitutional law. *Ibid.* It held that cases involving use of such procedures must be judged by the same general standard which was applied in *Stovall* to determine whether a corporeal showup prior to trial resulted in a denial of due process:

> ". . . [E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial

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ness' opportunity to view the suspect at the scene of the crime and the lighting conditions at that time. *Id.* at 738. These circumstances were not expressly mentioned in this Court's opinion.

> likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall v. Denno. . . .*" *Id.* at 384.

Applying this standard to the case before it, the Court noted that, in the first place, it had not been suggested that it was "unnecessary" to use photographic identification procedures. Use of such procedures was justified by the fact that the suspects were still at large when the pictures were shown to the witnesses and the fact that "[i]t was essential for the FBI agents swiftly to determine whether they were on the right track." *Id.* at 384-385. The justification for this method of procedure was "hardly less compelling than that which we found to justify the 'one-man lineup' in *Stovall v. Denno, supra.*" *Id.* at 385. The Court then noted that, in the second place, under the circumstances of the case there was little likelihood that the procedures utilized led to misidentification of Simmons. *Ibid.* In analyzing the reasons for this conclusion, the Court discussed such things as the lighting at the scene of the crime, the period of time the witnesses saw the man they later identified as Simmons, the length of time between the crime and the viewing of the photographs, the circumstances under which the photographs were shown to the witnesses and their degree of certainty regarding their selection. *Ibid.* The Court stated that, "Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal." *Id.* at 385-386 (footnote omitted). It is noteworthy that, although the Court's opinion mentioned the reasons why the particular photo identification procedures were employed, it did not suggest that lack of "necessity" for use

of photo identification procedures would weigh in favor of a finding that their use violated the suspect's due process rights.

In *Foster v. California* 394 U.S. 440 (1969), a case involving two lineups and a showup involving the same defendant, the Court applied the general test of *Stovall* to reverse the defendant's conviction. It did not mention the "necessity" or lack of necessity for the use of the particular procedures.

In *Coleman v. Alabama* 399 U.S. 1 (1970), the Court considered a claim of denial of due process by reason of a stationhouse lineup which was alleged to be unduly prejudicial. The Court carefully recounted the circumstances of the witness' observation of the defendants at the scene of the crime and the circumstances of the lineup, as well as several interviews between the police and the witness in the interval between the two events. The Court concluded that the trial court could properly find that the witness' identifications were entirely based on his observations at the scene of the crime and were not induced by the conduct of the lineup. In doing so it looked at the totality of the circumstances and did not articulate a more detailed standard than that which was employed in *Simmons*.

That the presence or absence of "necessity" for use of a particular identification procedure does not enter into the determination of whether the procedures used violated a suspect's due process rights became more explicit in the Court's subsequent cases regarding the effect of pretrial identification procedures on in-court identifications.

Neil v. Biggers 409 U.S. 188 (1972), was similar to *Stovall* in that the suspect was identified at a single-person

showup. The Court's opinion is especially significant because it synthesized for the first time the general principles to be gleaned from the Court's earlier cases and articulated them with greater precision.[6] The Court stated:

> "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.* at 198 (footnote omitted).

The Court then stated that:

> "What is less clear from our cases is whether . . . unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent [in order to construct a lineup], we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the

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[6]The *Simmons* standard had been criticized as being vague and difficult to apply. In *United States v. Cunningham* 423 F.2d 1269, 1272 (4th Cir. 1970), the Court stated that "articulation of the test describes a result but not how the result is reached."

police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such confrontation offends due process." *Id.* at 198-199.

In *Manson v. Brathwaite* 432 U.S. 98 (1977), a case involving a pretrial identification made after a police officer viewed a single photograph of the defendant, the Court stated that admission of evidence concerning a suggestive and unnecessary pretrial identification procedure would not violate due process as long as the identification itself possessed sufficient aspects of reliability. No evidence was offered as to why the single photo was shown to the witness, instead of a photo array. At trial the officer testified regarding his identification of the photograph and also identified the defendant in person. This Court, in holding that evidence of the pretrial identification was properly admitted, reaffirmed the view expressed in *Neil v. Biggers* that reliability is the linchpin in determining the admissibility of identification testimony regarding confrontations and that the factors to be considered were those set forth in *Neil v. Biggers,* 432 U.S. at 114. The Court declined the opportunity to formulate an automatic rule of exclusion of evidence of pretrial identifications made following suggestive and unnecessary pretrial identification procedures. *Id.* at 110-113. In doing so the Court stressed that the standard to be applied in determining whether such evidence should be admitted or excluded was the standard of fairness required by the due process clause of the Fourteenth Amendment. *Id.* at 113. This standard protects the defendant's *evidentiary* interest in excluding unreliable evidence, an interest already protected by the right of cross-examination

and by the other incidents of our adversary system. *Id.* at 113-114. In the absence of a finding that, under all the circumstances, there has been a very substantial likelihood of irreparable misidentification, a court should admit identification evidence. "Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* at 116. Thus, the Court concluded that the failure to use a procedure such as a photographic array, which would have enhanced the reliability of the identification testimony, went only to the weight to be accorded this evidence—not its admissibility.

The Ninth Circuit's approach is also contrary to the decisions of other circuits which have attempted to articulate definite standards to be applied in determining whether a defendant's due process rights have been violated because of pretrial identification procedures.[7]

[7]One case decided by the Court of Appeals for the Third Circuit took an approach which was somewhat similar to that of the Ninth Circuit. In *Government of the Virgin Islands v. Petersen* 553 F.2d 324 (3rd Cir. 1977), a witness was shown only two photographs, both of the same suspect. The Government conceded that this procedure was suggestive. The Court of Appeals, in determining whether this procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification, looked first to "the necessity for photographic identification as a method of zeroing in on a suspect of a serious crime still at large" and then at circumstances indicating that the witness had a substantial independent basis for making the identification. *Id.* at 327. Since the factor of "necessity" was present, the court did not discuss the effect which a finding of lack of "necessity" would have on its ultimate decision on the constitutional issue.

In *United States v. Marchand* 564 F.2d 983, 995 (2nd Cir. 1977), *cert. denied* 434 U.S. 1015, the court stated:

> "While it is preferable for law enforcement officers to use a line-up rather than photographic identification when the suspect is available, this is not a requirement."

To the same effect are *United States ex rel. Pella v. Reid* 527 F.2d 380, 384 (2nd Cir. 1975) and *United States v. Boston* 508 F.2d 1171, 1176-1177 (2nd Cir. 1974), *cert. denied* 421 U.S. 1001.

In *United States v. Evans* 484 F.2d 1178, 1184 (2nd Cir. 1973), the court, citing earlier Second Circuit cases, stated that the *Simmons* test is "a two-fold one." ". . . [T]o sustain the exclusion of identification testimony, there had to be a showing both of impermissibly suggestive procedures *and* of the substantial likelihood of misidentification. Where one or both were lacking, this court concluded that eyewitness identification testimony was to be admitted." *Id.* at 1184; see also *United States ex rel. Pella v. Reid, supra,* 527 F.2d at 383-384. The court specifically rejected a contention that "taint" is established prima facie when the government has failed to use a "more reliable source of identification" when it is able to do so. *Id.* at 1186, n. 8.

In *United States v. Gidley* 527 F.2d 1345 (5th Cir. 1976), *rehearing denied* 530 F.2d 976, *cert. denied* 429 U.S. 841, a case in which witnesses viewed a photo spread approximately two weeks before trial, the court stated that the *Simmons* standard "has developed into a two-prong test." *Id.* at 1350. The Fifth Circuit's two prongs were markedly different from the Ninth Circuit's. The Fifth Circuit identified them as:

> "First, the court must decide whether or not the photographic display was impermissibly suggestive. Second, the court must determine whether such a display created a substantial risk of misidentification at trial." *Id.* at 1350.

Discussing the first "prong" the court stated:

> "In determining whether the photographic display was impermissibly suggestive, we evaluate only the picture spread itself—whether other more desirable methods of identification were available or whether there was a compelling need for a photographic display are not relevant in the determination." *Id.* at 1350.

Similarly, in *United States v. Allison* 616 F.2d 779, 783 (5th Cir. 1980), the court stated:

> ". . .[T]he fact that there may have been time for a lineup can play no part in whether the photographic spread was impermissibly suggestive. 'Whether other more desirable methods of identification (e.g., a line-up) were available, or whether there was a compelling need for speedy identification are . . . not relevant to a determination of the impermissible suggestiveness issue.'"

Gidley has been consistently followed in the Fifth Circuit. Among the recent cases following it are *Frank v. Blackburn* 605 F.2d 910 (5th Cir. 1979) (rehearing en banc granted) and *Hudson v. Blackburn* 601 F.2d 785 (5th Cir. 1979). To the same effect is *United States v. Cueto* 611 F.2d 1056 (5th Cir. 1980).

In *United States v. Hurt* 476 F.2d 1164 (D.C. Cir. 1973), the court held that the five factors enumerated in *Neil v. Biggers* are to be considered only if the identification procedures are found to be suggestive. *Id.* at 1167-1168. The

court also held that there is no absolute constitutional right to a lineup. *Id.* at 1168.

Other cases are instructive not because they expressly state that "necessity" for use of photographic identification procedures in a particular case is irrelevant to determination of a defendant's constitutional claim, but because they determine constitutional claims regarding photographic identification procedures without any reference to the "necessity" for their use or to whether a corporeal lineup could or should have been held in their stead. For example, in *United States v. Sutherland* 428 F.2d 1152, 1155 (5th Cir. 1970), *cert. denied* 409 U.S. 1078, the court suggested a uniform procedure for the trial of cases in which a *Simmons* issue is present. Later cases in the Fifth Circuit have held that this procedure is equally applicable to all genre of identification techniques. See *Allen v. Estelle* 568 F.2d 1108, 1110-1111, n. 2 (5th Cir. 1978). To the same effect are *United States v. Sanchez* 603 F.2d 381 (2nd Cir. 1979); *United States v. Hancock* 558 F.2d 1300 (8th Cir. 1977), *cert. denied* 434 U.S. 872; and *Allen v. Moore* 453 F.2d 970 (1st Cir. 1972), *cert. denied* 406 U.S. 967.

The Ninth Circuit's approach is not supported by authorities outside the federal court system. The ALI Model Code of Pre-arraignment Procedure (1975) does not prohibit or restrict the use of photographic identification procedures to situations where photographic identification (as opposed to a corporeal lineup) is "necessary." The comments to section 160.2 of the Model Code (dealing with the conduct of identification procedures) note that, "most courts recognize no ban on photographic identification when the defendant is in custody and a lineup is feasible." *Id.* at 440.

In California, the state in which the crime occurred, it is clear that necessity for the use of photographic identification procedures plays no part in the determination of their constitutional validity. In *People v. Suttle* (1979) 90 Cal. App.3d 572, 153 Cal.Rptr. 409, a case in which a witness was asked to view a number of pictures after the defendant had been arrested, the court held that reference to the *Neil v. Biggers* criteria is not required in a situation where the pretrial identification procedure was not initially shown to be so suggestive as to lead to misidentification. The court also stated that:

> "Appellant does make the novel assertion that a corporeal lineup should have been employed since he was already in custody. He contends that 'identification from a still photograph is substantially less reliable than identification of an individual seen in person.' (*People v. Gould* (1960) 54 Cal.2d 621, 631 [7 Cal.Rptr. 273, 354 P.2d 865].) The Supreme Court in *Gould* cited Wigmore's treatise on Evidence for the quoted proposition. While we do not contradict such a source, it appears to us that the question regarding the reliability of identification procedures has always been whether the particular procedure employed is suggestive on the one hand, or reliable on the other. There is no requirement, constitutional or otherwise, that the *most* reliable technique be used. Here, since the photo identification was not suggestive, we will not go further by holding that a corporeal lineup should have been used since appellant was in custody and that his constitutional rights were violated because the police failed to do so."

Our conclusion that the Ninth Circuit was incorrect in holding that necessity for the use of photographic identification procedures enters into the determination of whether

their use in a particular case violated a defendant's due process rights is fortified by reference to the nature of the due process interest involved. This Court's cases were aimed at protection of his interest in excluding evidence which is especially unreliable. It is the likelihood of misidentification which violates his right to due process. Thus, the ultimate focus should be on the reliability of the evidence, which is the "linchpin" in determining the admissibility of identification testimony following pretrial confrontations. Necessity or lack of necessity for use of a particular pretrial identification procedure simply has no bearing on its reliability and thus should have no place in the determination of admissibility of subsequent identification testimony.

A simple hypothetical illustrates this point. Assume a case identical in all respects to the instant case, with the exception that immediately after the crime defendant Mata and his codefendants escaped from prison and remained at large until after October 27. They were then apprehended some distance away from the prison but were hospitalized because they were gravely ill. New photos of them were taken and were included in the group shown to the witnesses on October 30. These additional facts would probably convince the Ninth Circuit that it was "necessary" to use photographic identification procedures. This, in turn, would have a significant bearing on the resolution of their claims that the pretrial identification procedures violated due process. But these additional circumstances, assuming that they were not known to the witnesses, would have no conceivable bearing on their decision to select a particular photograph. They would not alter the degree of suggestiveness present

in the photographic identification procedures or the chance that an improper selection would be made.

B. The Court of Appeals Applied an Incorrect Standard in Determining Whether There Was a Substantial Likelihood of Irreparable Mistaken Identification

The Ninth Circuit's approach equates lack of necessity for the use of photographic identification procedures with impermissible suggestiveness and requires a court, without a further showing, to proceed from a finding of lack of necessity to application of the criteria for determining whether the identification evidence possesses sufficient aspects of reliability to justify its admission. But the test applied is not the one first enunciated in *Neil v. Biggers* and reaffirmed in *Manson v. Brathwaite.* Rather, the Ninth Circuit applied the test established by the United States District Court for the Eastern District of Missouri in a case decided before *Biggers* and *Manson. Parker v. Swenson* 332 F.Supp. 1225, 1230-1231 (E.D.Mo. 1971). *See also U.S. v. Field,* No. 79-1533 (9th Cir. Aug. 1, 1980).

Compare and contrast these disparate sets of factors:

(1) The opportunity of the witness to view the criminal at the time of the crime.	1. "The length of time and the conditions under which a witness was able to observe the perpetrator during the commission of the crime.
(2) The witness' degree of attention.	2. The similarity of the description given by a witness immediately after the crime to the physical characteristics of the individual he subsequently identifies.

(3) The accuracy of the witness' prior description of the criminal.

(4) The level of certainty demonstrated by the witness at the confrontation.

(5) The length of time between the crime and the confrontation.
Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

3. Conduct on the part of the police tending to focus attention of a particular subject.

4. Presence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection."
Parker v. Swenson 332 F. Supp. 1225, 1230-1231 (F.D. Mo. 1971).

The *Parker* test is fatally defective in that under its factors (3) and (4) are included the very elements of suggestiveness which are supposed to be placed to one side in order to evaluate the independent basis for the identification. It also fails to consider two of the five factors set forth by this Court: the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

After applying the *Parker* test, the Ninth Circuit refers to lack of "necessity" again—this time as a factor in its determination of whether use of the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 611 F.2d at 759. In so doing, it departs even further from this Court's decisions and the decisions of the other circuits.

C. Conclusion

We share the Ninth Circuit's belief that the appropriate standard for determining the admissibility of evidence of identifications made by witnesses who have participated in pretrial confrontations with the persons or pictures of possible suspects consists of two parts. As was noted above, we disagree with the Ninth Circuit's definition of those two parts. We submit that the initial focus of inquiry should be on the pretrial confrontation and the circumstances surrounding it with a view to determining whether that confrontation was so *impermissibly* suggestive that, all other things being equal, it might reasonably be expected to lead the witness to a mistaken identification. The focus of this inquiry is on the degree of suggestion present *in the particular procedures utilized.*

This Court has stated that, as a general rule, corporeal identification procedures are normally more accurate than photographic identification procedures. *Simmons v. United States, supra,* at 386, n. 6. We have no reason to quarrel with this general statement. However, it is also true that *any* identification procedure has some greater or lesser degree of suggestiveness. Although the police may at times use "blank" identification procedures, in which the persons or pictures of suspects have not been included, a witness may well assume that they have not arranged an identification procedure merely to waste time. He may well assume that the police have some reason to believe that at least one of the individuals whose person or picture he will view might be involved in the crime. At the very least, he may assume that the individuals before him may share some characteristic which indicates that they might conceivably

be involved in the crime. Any such procedure is also "suggestive" in the sense that, for the moment at least, the witness' attention has been directed to a finite number of persons or pictures, to the exclusion of all others.

The determination of impermissible suggestiveness is not subject to generalities. It does not matter that corporeal identification proceedings may, as a general rule, be more accurate than photo identification procedures. Photo identification procedures may be scrupulously fair. A physical lineup may consist of a giant and seven dwarves. Generalities simply do not assist in the resolution of these particular cases.

Only if it appears that the identification procedures actually used were impermissibly suggestive in that they singled out a particular suspect in such a manner as to give rise to a substantial likelihood that he *could* be misidentified does it become necessary for a court to apply the second part of the test for determining whether there has been a denial of due process. This part of the due process test is also a practical one, based on the facts of the particular case. It asks whether in fact there has been a very substantial likelihood of misidentification. The factors enunciated in *Neil v. Biggers* and *Manson v. Brathwaite* are considered at this point, as well as any other circumstances bearing on the likelihood of misidentification.

Thus, we adhere to the standard enunciated by the Second Circuit in cases such as *United States v. Evans, supra,* and by the Fifth Circuit in cases such as *United States v. Gidley, supra,* as being faithful and practical applications of the teachings of this Court's cases.

Such a standard is in harmony with this Court's general statement in *United States v. Ash* (1973) 413 U.S. 300, 321:

> "We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required."

It is also in harmony with the notion that the due process clause, to the extent that it should be applied to exclude identification evidence, should be result-oriented. Thus, it should be applied to exclude otherwise admissible evidence only when it appears that there has been a very substantial likelihood of irreparable misidentification. As stated by the Chief Justice in his dissenting opinion in *Brewer v. Williams* (1977) 430 U.S. 387, 425:

> "Recognizing that '[i]t is the likelihood of misidentification which violates a defendant's right to due process,' *Neil v. Biggers* [*supra,* at 198], we exclude evidence only when essential to safeguard the integrity of the truth-seeking process. The test, in short, is the reliability of the evidence."

For the reasons stated in our previous argument, we believe that the Ninth Circuit's application of an erroneous standard led it to an erroneous result and that application of the proper standard must lead to a conclusion that defendant Mata was not denied due process by reason of the admission of identification evidence at his trial.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals should be reversed and defendant's petition for writ of habeas corpus be denied.

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